No. 86-473

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the federal district courts have jurisdiction to entertain a citizen suit under the Clean Water Act against a past violator without proof or an allegation that the violation is continuing at the time of filing.

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BRIEF FOR THE RESPONDENTS

STATUTE INVOLVED

Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), provides in relevant part (emphasis supplied):

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) *against any person* (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) *who is alleged to be in violation of* (A) *an effluent* standard or *limitation under this chapter* or (B) an order issued by the Adminis-

trator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such an act or duty, as the case may be, and *to apply any appropriate civil penalties under section 1319(d) of this title.*

STATEMENT

The basic facts and procedural history of the case are stated by petitioner and we do not repeat them here. But, unsurprisingly, the picture is painted with a lawyer's artistic license, with all the client's warts removed, the colors romanticized, and many coats of varnish added.[1] Accordingly, it may be useful to stress a few bald truths —all of them explicitly recited in unchallenged documents of record, in the parties' Stipulation (Pet. App. 85 et seq.) or in the undisturbed Findings of the district court (J.A. 56-58, 71-118).

1. For more than a year and a half before petitioner acquired it at the end of October 1981, the plant in suit had "repeatedly exceeded a number of its [permit] discharge limitations," and this was fully known to peti-

[1] To cite only two examples, Gwaltney characterizes its operations as "normal," "generat[ing] non-toxic organic wastes" (Pet. Br. 3), and describes its improvements to the plant as "a new state-of-the-art wastewater treatment system." Pet. Br. 21. In actuality, the wastes Gwaltney discharges have the potential for producing harm to aquatic organisms and can pose a public health threat (J.A. 100, 105, 106, 110, 113), and Gwaltney's wastewater treatment system improvements simply constitute standard treatment for nitrogenous wastes. J.A. 21-25.

tioner. J.A. 73, 100, 110. Indeed, from February 1980 through October 1981, the previous operator had been out of compliance for 13 months out of 21 (R. 350-A) and had committed at least 94 violations (*ibid.*), many of them by discharges grossly in excess of the permit (*see* R. 440-457). Yet, although it was aware of these defaults and of the need for substantial improvements even before purchasing the plant (*e.g.*, J.A. 65-68), petitioner was extremely slow in taking effective measures to correct either the cause of the chlorination problems or the biological treatment system. As to the first, the district court noted petitioner's refusal to seek outside advice (J.A. 100, 108), and characterized its attitude as "exceeding unconcerned," "lackadaisical," "border[ing] on benign neglect," and "reflect[ing] a certain degree of willfulness." J.A. 107-108. Likewise, as to the second problem, the court found that petitioner took no remedial steps whatever for more than six months (J.A. 110, 114) and did not complete the new treatment system until October 1983, two years after acquiring the plant. J.A. 111. Moreover, while failing to deal adequately with the waste treatment problems, petitioner increased production at the plant, putting additional burdens on the already deficient waste treatment system. J.A. 66, R. 521.

2. Predictably, the consequence of this unconcerned and unhurried approach was that excessive discharges of pollutants continued unabated for a substantial time. Indeed, significant violations persisted for more than two and a half years after petitioner became the operator, until mid-May 1984. J.A. 116-117. Nor were these merely occasional "upsets." In this period of 31 months, full compliance was achieved in only four months (J.A. 96-97, 116-117), and more than 160 different violations occurred (J.A. 100, 116-117), many quite egregious. *See* R. 314-348.

When petitioner's record is examined in greater detail, it is no better. As the district court noted (J.A. 105),

despite the attempt to "trivialize" the fecal coliform violations, these "were not *de minimis*." On at least six occasions, four to seven times the daily limits were discharged and for five months the permitted monthly average was exceeded by 58% to 150%. *Ibid.* So, also, there were 34 chlorine violations, occurring every month for a full year after petitioner took over the plant. J.A. 106, 116. And in all but two of those months, potentially very harmful excessive chlorine discharges were effected. J.A. 106.

The TKN problem persisted even longer—if, indeed, it has been permanently solved. *See* J.A. 111, 112 n.26, Pet. App. 7a n.9. There were violations as late as mid-May 1984—just a month before suit. J.A. 73, 100, 112. The permitted monthly average had been exceeded in most months up to that time, and, in addition, some 69 discharges in excess of the daily limit occurred. J.A. 116-117. Moreover, whether or not "controllable," many of the more numerous and gross violations were very fresh in June 1984. J.A. 117; R. 314-333.

Nor were these excessive discharges merely technical violations, relatively harmless to the environment. Fecally associated microbes are potential agents of disease transmission which pose a significant threat to human health. Chlorine is acutely toxic to fish and other estuarine organisms. And excessive levels of ammonia and organic nitrogen (measured by the "TKN" standard) deplete the water of dissolved oxygen and thereby endanger bottom dwelling species, such as oysters. *See* J.A. 100-113.

3. This, then, was the situation in early 1984 when respondents began the process of initiating legal action. Several violations occurred during February 1984, the month at the end of which the statutory notice of intent to sue was served. *See* Pet. App. 80a. The Complaint, filed June 15, 1984, correctly alleged that petitioner had

"continued to violate its discharge permit since that [notice letter]." Para. 17, Pet. App. 82a-83a. The most current information available to respondents at the time of filing suit (for March 1984) showed violations still to be occurring—and they did, in fact, persist some six weeks longer. It was then reasonable to suppose, as was stated in the Complaint, that "without the imposition of appropriate fines and issuance of an injunction, [petitioner would] continue to violate its NPDES permit." Para. 18, Pet. App. 83a.

We need only add that, despite an intervening judgment holding it liable, an elaborate stipulation and a trial, petitioner did not question the district court's jurisdiction on the ground that there was no ongoing violation until 11 months after the Complaint had been filed. J.A. 69; *see* J.A. 72. That, however, is now the sole issue in this Court, petitioner having long since abandoned its challenge to respondents' standing (*see* Pet. App. 2a n.1) and more recently given up its quarrels over the penalty calculation. Pet. 24 n.17; Pet. Br. 7 n.8, 33 n.42.

SUMMARY OF ARGUMENT

A

Our initial submission is that the import of using the present tense in describing the violator of the Clean Water Act against whom a citizen may file suit is not so plain as to foreclose resort to the usual aids to statutory construction. Significantly, no party and no amicus espouses a strictly literal reading of the text—which would deny jurisdiction unless the defendant were at least alleged to be actively violating his permit on the very day suit is filed. Indeed, petitioner has been ambivalent about the true reach of Section 505, apparently failing to notice the present tense as a jurisdictional restriction until almost a year after this suit was filed and now having significantly tempered its once inflexible stand.

B

The statutory context of the critical words indicates that they were not intended to preclude citizen suits in respect of past violations. First, Section 505 itself expressly authorizes the assessment of civil penalties—which obviously relate to past conduct. Moreover, a comparable use of the present tense in describing governmental suits plainly does not bar recovery against a violator who has ceased his excessive discharges, and there is no reason for reading the same phrase differently in the two provisions. Indeed, given the critical role of civil penalties in enforcing the Act, one would expect this weapon to be equally available to the citizen who is "standing in" for the government.

C

The legislative history of the Act confirms our construction. There are express statements endorsing that reading by one of the chief sponsors of the measure which cannot be explained away. And this view is endorsed in the recent Water Quality Act of 1987 which assumes that a citizen suit properly might be maintained solely to assess civil penalties in respect of past violations.

D

Implementation of the objectives of the Act is best served by the construction of Section 505 espoused by both courts below. A "private Attorney General," whose role is to step in when governmental officials default, ought to have the same right of action. The Act would too easily be frustrated if suit were barred whenever the violator, forewarned by the required notice, temporarily desisted. And delay in compliance would be rewarded—not discouraged—if past violations were automatically excused, provided they ceased before a citizen suit is filed. No. can it be right to defeat jurisdiction merely because, as here, the suit followed the notice by six weeks more than the statute requires.

E

Our construction of Section 505 does not invite a deluge of needless lawsuits. The unavailability of compensatory damages and the exposure of the plaintiff to an assessment of the defendant's costs and attorney fees both deter frivolous litigation. At all events, in recently reviewing actual experience, the Congress has declared itself well satisfied with the result.

ARGUMENT

Trimmed of frills and curlicues,[2] petitioner's argument comes down to harping on Congress' use of the present tense when referring to a potential defendant "in violation" of the Clean Water Act against whom a citizen suit may be filed. The immediate provision, it is repeatedly stressed, only permits a citizen to "commence a civil action . . . against any person . . . who is alleged *to be in violation* . . . of an effluent standard or limitation under [the] Act." Sec. 505(a)(1), 33 U.S.C. 1365(a)(1) (emphasis supplied). But the question for the Court is whether the underlined language is so unequivocal, so unambiguously clear, so obviously single-minded, that it forbids looking further to discover whether Congress really meant to bar any citizen suit filed after a violator has halted his excessive discharges, no matter how fresh the most recent violations, how long they persisted, and how likely they would be resumed once the action was dismissed. Is the text so plain that we cannot notice the statutory context and the wording of companion provisions, cannot resort to legislative history, and cannot even apply the test of common sense?

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[2] The plethora of small points and "asides" in petitioner's brief tends to deflect the reader from the central issue. In the interest of clarity, we have mostly resisted the temptation of answering petitioner by following it down every byway, and have attempted to stay on the main road. But our silence on any point ought not be read as acquiescence.

A. THE PLAIN MEANING DOCTRINE IS INAPPOSITE HERE

1. This is not that rare case—assuming the text alone should ever be the exclusive guide to meaning. *See Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-11, 23-24 (1976). The less crabbed reading of the citizen suit provision condoned by both courts below involves no clash with the statutory language, no contradiction, no disregard of engrossed words or smuggling in of additional ones. At worst, the construction we urge taxes Congress with a debatable lapse of syntactical precision in using one tense as shorthand for both past and present. Given the size of our statute book, there is much to be said for taking such a minor liberty in the service of economy. But, even if we are dealing with a careless accident, the reality is that common folk, including lawyers and politicians, mix and mistake their tenses much too often to give loose usage of this kind critical significance.[3] It would ill serve the framers of the law to ignore their intent because we were constrained to pretend they were always punctilious grammarians.

2. Indeed, petitioner's own ambivalence about the reach of the citizen suit provision makes our point in a most telling way. One can but wonder why it took petitioner 11 months after the filing of suit to invoke the present tense of Section 505 as a ground for challenging the court's

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[3] It is, for instance, a familiar convention to recount past events in the present tense ("I enter the intersection first; he goes right past the stop sign; he smashes into my car.") Lawyers easily lapse into the present when reciting the facts of a decided case—or the facts of the case on trial. And politicians commonly do likewise when referring to the stand of their opponent, spoken or written some days or months earlier ("He says he will reduce your taxes, while promising you more government benefits of every kind!"). Legislation is not uniquely exempt from the same habit. It is enough to note that most of the Criminal Code, although obviously addressed to past occurrences, is written in the present tense. *See* 18 U.S.C. 32-2512.

jurisdiction. (Complaint filed June 15, 1984, J.A. 1, Pet. App. 79a; Motion to Dismiss filed May 16, 1985, J.A. 5, 69). In the interim, there had been very active proceedings (*see* J.A. 1-5), including a summary judgment declaring petitioner liable (J.A. 56-58, 59-60), an amendment of that judgment (J.A. 61-62), extensive discovery, the preparation of a detailed Stipulation of facts (Pet. App. 85a-96a, R. 15-29), and a trial (R. 30-242; *see* J.A. 63-68), all accompanied by elaborate briefing. It seems fair to conclude that the meaning of the words in Section 505 was not then thought so "plain" as is now claimed.

Equally revealing, however, is petitioner's present stand. In the Court of Appeals, a more robust position was asserted. *See* Brief of Defendant-Appellant 11-14. But, in this Court, petitioner and its many friends ultimately agree that the statutory text is not to be read with absolute literalness. Although the present tense of Section 505 continues to be the mainstay of the argument on that side, no one now will be heard to espouse a construction of the citizen suit provision that requires proof, or even a bona fide allegation, that the defendant was actively violating his permit on the day the suit was filed. Pet. Br. 16-18, 29 n.30, 39-40 n.51; Br. A.C. of Chamber of Commerce of the United States, et al. 10, 18-20; Br. A.C. of Connecticut Business and Industry Association 53-59, 61; Br. A.C. of Consolidated Rail Corporation, et al. 11-13; Br. A.C. of Mid-Atlantic Legal Foundation, Inc., et al. 1, 5-6.[4] This is likewise the view of the First Circuit. *Pawtuxent Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1093-1094 (1st Cir. 1986), *petition for*

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[4] Two amici do not address the question presented at all, but, instead, advance Separation of Powers arguments against *any* reading of Section 505—contentions not before the Court. *See* Brief A.C. of Bethlehem Steel Corporation, et al. 3-4, 7 n.7; Br. A.C. of Rollins Environmental Services (N.J.) 2 and nn.2 and 3, 3-6. The full answer to these arguments was given some 45 years ago in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-548 (1943).

cert. filed, No. 86-1562 (Mar. 17, 1987). And, if we accept Judge Williams' opinion, the same reluctance to be too literal prevails in the Fifth Circuit. *See Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 399 (5th Cir. 1985) (concurring opinion).[5] The upshot is a variegated menu revealing interesting differences among our opponents as to what being "in violation" *does* mean. *Compare, e.g.*, Br. A.C. of Chamber of Commerce of the United States, et al. 17-19 (endorsing First Circuit's focus on prospect of future violations) *with* Br. A.C. of Consolidated Rail Corporation, et al. 11 (apparently rejecting that test).

We need not detail these disagreements here. What is significant is the fact that, while invoking the "plain meaning" rule, everyone finds it necessary to escape from the strict grammar of the text and no two proponents of reversal agree on exactly what new meaning is to be given to the statutory language. Petitioner and its friends (unlike the First Circuit) also effectively delete "alleged" from Section 505. *E.g.*, Pet. Br. 37-41. We, of course, share the view that one must go beyond the immediate words to learn the intent of Congress. For our part, however, we submit that once the blinkers are removed and we are free to look to the side, and behind, the correctness of the decision below is quickly revealed.

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[5] We assume Judge Williams, as a member of the panel and a signatory of the court's opinion, is best placed to say that the court was *not* insisting on proof of an active permit violation occurring on the very day of filing. It is noteworthy, however, that some district judges within the Circuit apparently have read the *Hamker* decision more literally as requiring such proof. *See, e.g., Sierra Club v. Copolymer Rubber and Chemical Corp.*, 621 F. Supp. 1013, 1015 (M.D. La. 1985), *appeal pending*, No. 85-3763 (5th Cir.). Even in the Fifth Circuit, however, different readings of *Hamker* appear to be entertained. *See, e.g., Sierra Club v. Kerr-McGee Corp.*, 23 Env't Rep. Cases (BNA) 1685, 1688-1690 (W.D. La. 1985).

B. THE STATUTORY CONTEXT SUGGESTS OUR CONSTRUCTION OF SECTION 505

1. The first thing that strikes the eye when it is allowed to get past the words of Section 505(a)(1), quoted above, is that the citizen suit provision *itself explicitly authorizes the assessment of civil penalties in such a private action.* Sec. 505(a), 33 U.S.C. 1365(a), last clause. *See Middlesex County Sewerage Authority v. Sea Clammers Ass'n*, 453 U.S. 1, 14 n.25 (1981).[6] A layman might think this would end the debate. But lawyers do not so readily give up; the suggestion, as we understand it, is that civil penalties for past violations may be ordered in a citizen suit *only if the defendant was engaged in an "on-going violation" of the Act when the action was filed.*

One may well ask what sense that makes. It might have been plausible (albeit unrealistic) to restrict all civil enforcement of the Act to seeking prospective—injunctive—relief only. So, also, some might think it "inappropriate" for a non-governmental plaintiff to be provoking an award of penalties that are paid into the national Treasury.[7] What is *not* easy to understand is why a private complainant should be entitled to seek an order for penalties in respect of past events if violations are continuing when the suit is filed, but not otherwise.

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[6] The cited note of course qualifies the earlier statement in the Court's opinion that the citizen suit provision of the Clean Water Act "authorizes only prospective relief." 453 U.S. at 6. At all events, there was no issue in *Sea Clammers* as to what relief was available *under* Section 505. The notice requirement of that provision having been ignored, all the claims were made under other theories, on the argument that the citizen suit provision of the Act did not pre-empt or supplant all other private rights of action. *See* 453 U.S. at 5 and n.6, 9-11.

[7] This may have been the view indulged at the time of the passage of the Clean Air Act, which does not provide for the recovery of civil penalties in private litigation. 42 U.S.C. 7604. *See* p. 17, *infra*.

There is certainly no logic in such a scheme: whether to penalize or forgive the sins of the past ought not be made to depend entirely upon a present fact or a future prediction, but, rather—as in government litigation—on the gravity and persistence of the violations and any "unjust enrichment" resulting from non-compliance. Nor is that all. To restrict civil penalties to the atypical case in which the polluter's continuing violations justify an injunction is to provide the sanction when it is least needed and to withhold it when the salutary effect would be greatest. It must be deemed unlikely that Congress pointedly added the weapon of civil penalties in citizen suits, but then confined its use to situations that were adequately dealt with by issuing an injunction, whose disobedience could be punished under the contempt power.

2. We are confirmed in the view that no such unusual result was intended when we consult other provisions of the Clean Water Act, notably those dealing with *governmental* enforcement actions. Here, also, the present tense is used: the EPA Administrator may initiate civil proceedings if he "finds that any person *is in violation*" of the Act. Secs. 309(a)(1) and (3), 309(b), 33 U.S.C. 1319(a)(1) and (3), 1319(b) (emphasis supplied). But, in this context, it is all but conceded that we ought not read the provision literally as foreclosing suit because excessive discharges did not occur on the day the "finding" was recorded or the action was filed.[8] Indeed, this Court has effectively held that the government may collect civil penalties for past violations when compliance

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[8] This was made plain by the Senate Conferees in reporting the outcome of the House-Senate Conference (118 Cong. Rec. 33697 (1972) (emphasis supplied)):

> "It is expected, of course, that upon receipt of information giving reason to believe that a violation *has occurred*, [the Administrator] has an affirmative duty to take steps necessary to determine whether a violation *has occurred* . . . ."

has been achieved and injunctive relief accordingly is not sought. *Tull v. United States*, No. 85-1259, slip op. 12 (April 28, 1987). Yet, if that is so, why should comparable language be read differently in the citizen suit provision?

It is no answer to say that there are differences between governmental and private proceedings, and that the latter should not duplicate the former. To be sure, the statute draws a distinction, but it is no more than to require a waiting period for a citizen, with notice to both federal and State authorities, and to preclude a new suit if either government is already "diligently prosecuting a civil or criminal prosecution" to the same end. Sec. 505(b)(1), 33 U.S.C. 1365(b)(1). Even then, however, the citizen may intervene of right in the public action. Sec. 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B). It hardly makes sense to accord a private citizen the right to sue as intervenor but not as sole plaintiff in respect of past violations.

What is more, in respect of civil penalties, the same provision (Section 309(d), 33 U.S.C. 1319(d)) governs both public and private suits and it would be strange to give it a different scope depending on the status of the plaintiff. The fact is that, criminal sanctions aside, there is no difference in the relief available in private and governmental suits. *Compare* Secs. 505(a) and (d), 33 U.S.C. 1365(a) and (d), *with* Secs. 309(b) and (d), 33 U.S.C. 1319(b) and (d). Nor is this surprising, especially as it relates to civil penalties. Exposure to such penalties—unlike the prospect of ultimate injunctive relief—is a powerful deterrent to violations by the prospective defendant, and the actual assessment of penalties against him will deter others. Moreover, when time is of the essence—as is the case with the Clean Water Act—civil penalties are the only effective weapon for overcoming what would otherwise be the natural inclination of a discharger to postpone expenditures neces-

sary to achieving compliance and to enjoy an interim advantage over law-abiding competitors. *See* EPA Civil Penalty Policy, 41 Env. Rptr. (BNA) (Fed. Laws) 2991, 2992-2993, 2996-2999 (1984). Given this critical importance of civil penalties in the present context, one would expect the weapon to be equally available in a citizen suit—whose primary function, after all, is to substitute for a government action that should have been initiated but, for whatever reason, was not. And if (as is the fact) the government can sue for penalties only, so should the private alter ego.

3. At first blush, one might read the requirement of 60 days' prior notice to the violator in the citizen suit provision as restricting judicial intervention to those intractable cases in which the polluter refuses to comply even after warning and, accordingly, is still actively violating the Act when the action is filed. *See* Sec. 505(b)(1)(A), 33 U.S.C. 1365(b)(1)(A). The problem with that line of reasoning is that we know the Administrator may sue for penalties only, and is free to initiate court proceedings with no prior notice whatever. *See* Secs. 309(a)(1) and (3), 309(b), 33 U.S.C. 1319(a)(1) and (3), 1319(b). That being so, it would be quite extraordinary to give a violator two months to bring himself into compliance and avoid legal proceedings altogether whenever the government defaulted and a private citizen was filling the void.

On reflection, it is clear that the notice requirement in Section 505 is for the purpose of affording federal and State authorities an opportunity to act, not to offer the violator a chance of escaping the penalties of the law. He is merly an incidental beneficiary of the notice rule, presumably included only because it seemed right to inform him that he was being reported to the authorities as a lawbreaker.

C. THE LEGISLATIVE HISTORY OF THE ACT CONFIRMS OUR CONSTRUCTION OF SECTION 505

1. Given the express terms of the citizen suit provision, we make no point of the fact that the relevant committee reports refer to civil penalties as available in private actions. *See* H.R. Rep. No. 911, 92nd Cong., 2nd Sess. 133 (1972); S. Rep. No. 414, 92nd Cong., 1st Sess. 79 (1971). But it is not without significance that nothing in the reports—or elsewhere—expressly or implicitly restricts a penalty award to citizen suits filed while the violation is ongoing. The short-hand characterization of such suits as "abatement" actions (*e.g.*, S. Rep. No. 414, *supra*, at 79-81) merely reflects the reality that, most typically, a private action will be provoked by the apparently persistent violator. This is a far cry from the statement that private actions will only lie against dischargers still actively violating the Act on the day of filing. After all, a prime purpose of civil penalties is to prevent future violations by deterring those who are, for the moment, in compliance—whether the defendant himself or others.

But the matter is not left to conjecture. We have already noted the express statement of the Senate Conferees that a *government suit* may focus on past behavior. Note 8, *supra*. And we have submitted that it must equally be so in citizen suits since, examining the statutory text, it does not appear that a private action is more circumscribed as to the conduct that can be reached. Pp. 13-14, *supra*. This is confirmed when we return to the legislative history. The Senate Report (S. Rep. No. 414, *supra*, at 80) explains:

> The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same.[9]

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[9] It does not matter whether the expression "administrative enforcement" here refers to non-judicial proceedings or to court action by the EPA Administrator. Under the Act, the Administrator is

So, also, the Report impliedly repudiates the notion that the 60-day notice requirement for citizen suits was meant to offer the violator a ready escape from litigation. The stated objective is merely to "encourage and provide for agency enforcement." S. Rep. No. 414, *supra*, at 79.

2. There is, indeed, incontrovertible legislative evidence specifically espousing our construction of the citizen suit provision. As the courts below stressed, Senator Muskie, one of the principal authors and sponsors of the bill, expressly stated that view (118 Cong. Rec. 33700 (1972) (emphasis supplied)):

> This 60-day provision was not intended, however, to cut off the right of action a citizen may have with respect to violations that took place 60 days earlier but which may not have been continuous. As in the original Senate bill, a citizen has the right under Section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one.

And elsewhere (118 Cong. Rec. 33693 (1972)), the same Senator said citizen suits—no less than governmental enforcement actions—would lie "against both continuous and intermittent violations."

It simply will not do to ignore these statements as "stray remarks" by "one legislator." Pet. Br. 28. The principal quotation above is derived from a written commentary, presumably a well considered and authoritative summary of the legislation in its final form by its "primary author" (*E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977); *Train v. Colorado Public In-*

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free to file a civil lawsuit whenever he is authorized to issue a compliance order. Section 309(b), 33 U.S.C. 1319(b). *See also* Section 309(a)(1) and (3), 33 U.S.C. 1319(a)(1) and (3).

terest Research Group, 426 U.S. at 14).[10] Nor can Senator Muskie's unambiguous words be diminished by looking to the comments of another Senator speaking to *other* legislation, of two years before, that did *not* authorize penalty awards in citizen suits. Pet. Br. 30. *See* 42 U.S.C. 7604 (Clean Air Act). The Clean Water Act quite deliberately modified its model in this respect. S. Rep. No. 414, *supra*, at 79; H.R. Rep. No. 911, *supra*, at 133.

In sum, the contemporary legislative history fully confirms what the textual evidence and considerations of legislative policy already indicated: that a citizen may maintain his suit against a violator without alleging, much less proving, that excessive discharges were continuing at the time of filing.

3. What is more, Congress subsequently endorsed our reading of the citizen suit provision when it recently revisited and amended the Act. Section 314 of the Water Quality Act of 1987, Pub. L. 100-4, adds a new provision to Section 309 of the Clean Water Act permitting the *administrative* assessment of civil penalties which expressly uses the past tense: "Whenever . . . the Administrator [of EPA or the Secretary of the Army] finds that any person *has violated* . . . any permit condition or limitation." Sec. 309(g)(1)(A) and (B), as added in 1987, 33 U.S.C. 1319(g)(1)(A) and (B) (emphasis supplied). This new authority necessarily focuses on past violations, supplementing, as it does, the Administrator's pre-existing authority to issue compliance orders under Section 309(a)(1) of the Act. *See* S. Rep. No. 50, 99th Cong., 1st Sess. 26 (1985); H.R. Rep. No. 1004, 99th Cong., 2d Sess. 132-133, 135-136, 138-139

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[10] Petitioner notes that this commentary was not published in the Congressional Record until after the Senate vote. But it is entirely possible that the written summary was available to Senators before publication. At all events, we may accept the commentary as accurately reflecting the view of the Senate conferees.

(1986). Yet, the new subsection explicitly contemplates that a citizen suit may already have been filed to assess the same penalty and, in that event, allows it to proceed. Sec. 309(g)(6)(B), as added in 1987, 33 U.S.C. 1319(g)(6)(B). So, also, where the administrative penalty action is first begun, a citizen suit to the same end is precluded, but only insofar as it reaches the identical past violations. Sec. 309(g)(6)(A), as added in 1987, 33 U.S.C. 1319(g)(6)(A).[11]

There is here a strong indication that the Congress believed existing law authorized citizen suits addressing past violations that no longer required injunctive remedies. Although the new provision dealing with administrative penalties employs the past tense in describing the violation, it was evidently deemed unnecessary to amend either Section 309(a) or (b) or Section 505(a)(1) to conform. Nor can this have been mere oversight. The Water Quality Act was elaborately considered over two years before ultimate enactment, affording ample opportunity for noticing and correcting any deficiency. The natural inference is that Congress saw the present tense of Sections 309 and 505 as no limitation on penalty actions in respect of past violations. In the circumstances, this is a reliable guide to the original intent of the Clean Water Act. *Cf. Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983), and cases cited at 601.

D. OUR CONSTRUCTION OF SECTION 505 BEST IMPLEMENTS THE CONGRESSIONAL OBJECTIVES

Needless to say, the Court cannot rewrite a statute because it believes giving the law a broader scope would be better policy. On the other hand, it must be right to

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[11] The Senate Report (No. 50, *supra*, at 28) explicitly states that the preclusive effect of an administrative penalty action does not apply to a citizen suit "for a past violation of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)."

resolve any genuine ambiguity by ascribing to Congress the intent to achieve the result that apparently best serves the public interest. Surely, no one can fault us for indulging a presumption in favor of our legislators as wise and public-spirited statesmen. It is therefore appropriate to test the conflicting interpretations of the statutory provision against the presumed purposes of the legislation.

1. There is no mystery about the objective of the Clean Water Act amendments of 1972 wholly to eliminate the pollution of navigable waters within a dozen years, and, to that end, to enlist federal, state and private incentives. *See* Sec. 101(a)(1), 33 U.S.C. 1251 (a)(1); *Train v. City of New York*, 420 U.S. 35, 37, 45-46 and n.10 (1975); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 203-209 (1976); *E.I. du-Pont de Nemours and Co. v. Train*, 430 U.S. at 116, 132-133; *Milwaukee v. Illinois*, 451 U.S. 304, 317, 319 (1981); *Sea Clammers*, 453 U.S. at 13-14; *International Paper Co. v. Ouellette*, No. 85-1233, slip op. 6, 7, 15 n.18 (Jan. 21, 1987). Not unimportant in this comprehensive scheme is the provision for citizen suits, whose function is not to compensate adversely affected persons, but to enlist them as "private Attorneys General" in aid of government plaintiffs or in their place, should they default. *Sea Clammers*, 453 U.S. at 15-17. *See also id.* at 14 n.23. Thus, it seems obvious a private plaintiff, if he is to be an effective substitute, must have the same litigating weapons as the government itself. Nor ought we assume that the launcher for the most important of the weapons—civil penalties—was rendered all but inoperative before being turned over to the citizen. *See* pp. 12, 13-14, *supra*.

2. There is, moreover, a very practical objection to petitioner's reading—which cannot have escaped the eye of Congress. It is this: in most cases, the fact of exces-

sive discharges is known to the public only through the required discharge monitoring reports (DMRs); but the underlying water samplings are usually at least days, and may be weeks or even months, apart and the reports are typically filed a month or more after the sampling event. *See* S. Rep. No. 414, *supra*, at 11. In the circumstances, it would be most odd to require the plaintiff to allege what he cannot yet know, the present continuation of previous excessive discharges revealed by the most recent reports, which may be quite stale. In fact, because of the retrospective nature of monitoring and of calculating the monthly average, the operator himself is often uncertain whether he has ceased excessive discharges until the last samplings are taken, after a citizen suit has been filed.

Nor is that all. Suppose the violator, forewarned by a citizen's statutory notice, temporarily desists, albeit with every intention of resuming his excessive discharges once the threat of litigation has receded.[12] And let us further suppose that the temporary cessation of polluting activity is sufficiently made plain that the potential citizen plaintiff cannot in good faith allege a presently continuing violation. Is this simple scenario sufficient to evade the Clean Water Act when governmental authorities stand aside?[13] In legislation that takes itself seriously, a nega-

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[12] It might be suggested that the potential citizen plaintiff need only remain poised to file this suit as soon as excessive discharges resume. But, because the DMRs always relate *past* violations, the current status can never be known. Moreover, the effectiveness of the statutory notice may lapse after a time and a fresh 60-day notice might be then required before suit. *Cf.* Section 309(g)(6)(B)(ii) of the Act added by Sec. 314 of the Water Quality Act of 1987, Pub. L. 100-4 (limiting the effectiveness of a notice for some purposes to 120 days). Indeed, we assume petitioner would say that the initial notice ceases to form a predicate for suit as soon as excessive discharges are halted.

[13] The problem is compounded if, as petitioner sometimes intimates, even the federal Administrator is barred from suing while

tive answer seems compelled, as Judge Williams suggested, concurring in *Hamker v. Diamond Shamrock Chemical Co.*, *supra*, 756 F.2d at 399. Yet, petitioner's construction of Section 505 forbids a citizen suit in these circumstances.

We address in a moment the concerns expressed about the potential abuses presented by unchecked citizen suits. Pp. 22-26, *infra*. But we must accept, at the outset, that the provision was intended to have a significant deterrent bite. The balance is well struck, it seems to us, by permitting the assessment of civil penalties for past violations in appropriate circumstances. Because the award is paid into the federal Treasury and is, in any event, discretionary with the court, it affords no undue incentive to the plaintiff. Yet, at the same time, the prospect of a substantial penalty will deter violations and encourage prompt curative measures, and the actual assessment of penalties will goad other dischargers into compliance. There is no reason to suppose Congress would not have intended such a salutary result.

3. As it happens, the present case tellingly illustrates the appropriateness of our reading of Section 505. As we have detailed in the Statement (pp. 3-4, *supra*), petitioner was a serious multiple violator over many years. To deal with one category of pollutants, petitioner very belatedly made relatively inexpensive improvements to its treatment system at the repeated insistence of the State authorities. J.A. 111 and n.25. Nevertheless, grossly excessive discharges had persisted without interruption for some six months thereafter when respondent served its statutory notice on February 29, 1984 (J.A. 116-117, R. 317-323). And in four of those months, there were other violations as well. *Ibid.* Nor did even the

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there is no present excessive discharge. *See* Pet. Br. 23-24 ("Even assuming *arguendo* that EPA can seek penalties for purely past violations . . .").

warning of a forthcoming lawsuit provoke immediate compliance. The monthly average permitted discharges of TKN were exceeded in March, April, and May—not to mention three violations of the much more generous one-day maximum, twice in April and once in May. *Ibid.* Petitioner did not cease excessive discharges until May 16, 1984, just a month before this suit was filed.

Such a record hardly commends itself for a ruling of total exemption from liability simply because active violations had stopped—whether temporarily or permanently only time would tell—on the day of filing. Indeed, the irony is that under petitioner's submission the present suit *would* lie if it had been instituted a month or so earlier, as the 60-day rule allowed.[14] Thus, according to this argument, the district court's jurisdiction failed only because respondents waited a little longer than the law required before filing their action. We cannot lightly ascribe such a senseless result to a rational Congress.

E. OUR CONSTRUCTION OF SECTION 505 CREATES NO RISK OF UNFAIRNESS OR ABUSE OF THE COURTS

Throughout this case, and others like it, there have been half-spoken, and wholly unsupported, suggestions that the "broad" reading of the citizen suit espoused by the courts below would work unfairness to industry and place an undue burden on the federal courts. We readily agree that the pressures on dischargers *are* measurably greater because of the availability of private lawsuits. If it were otherwise, there would be no point in permitting such actions. And, obviously enough, these suits do, in some degree, increase the volume of federal court litigation under the Clean Water Act. Again, however, it is

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[14] The statutory notice having been served on the last day of February 1984, the 60-day period elapsed at the end of April. Had the suit been filed then or any time in the following two weeks, petitioner would have been "caught red-handed."

plain Congress determined that this was an acceptable cost, and the Court cannot be asked to defeat the legislative scheme in the name of protecting overburdened judges. But, it need hardly be said, there are limits. It *would* be difficult to defend a construction of Section 505 that produced a deluge of essentially pointless litigation. We ought not suppose Congress is so callous toward unjust harassment or so heedless of the problems of a coordinate branch.

1. In the present context, no such risk is presented. There is no real incentive for the filing of a citizen suit against a one-time polluter who has long since mended his ways. If deterrence of future violations is unnecessary, the private plaintiff has little or nothing to gain by seeking an award of statutory penalties that will not come to him. There is, as this Court has firmly held, no possibility of obtaining compensation for past injury through the recovery of damages, whether under the Act or federal common law. *Sea Clammers, supra.*[15] And even the expenses of litigation can be refused if the court concludes that the action served no purpose; indeed, the initiator of merely harassing litigation can be required to pay the costs and attorney fees incurred by the defendant, as well as his own. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692-693 and n.13 (1983); *id.* at 707 (Stevens, J., dissenting).

Nor need we rely entirely on the self-interest of potential plaintiffs. The courts are not helpless to deal with

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[15] Settlement payments earmarked for specific environmental purposes are no exception. These are simply contributions to particularized *public* programs, not compensation for private injury. In specified circumstances, such "alternative payments" continue to be encouraged by EPA (*see* EPA Civil Penalty Policy, *supra*, at 3002-3003), and, at all events, have been endorsed by Congress as furthering the objectives of the Clean Water Act. H.R. Rep. No. 1004, *supra*, at 139.

silly or vindictive lawsuits. Proof of an excessive discharge in the past does not *require* the imposition of a penalty: although the violator is "subject to" such an assessment (Sec. 309(d), 33 U.S.C. 1319(d)), it is for the court to decide, in each case, whether an award is "appropriate." Sec. 505(a), 33 U.S.C. 1365(a). The court may well determine against a penalty if the violation is isolated or if effective corrective measures were promptly taken some time ago.

Moreover, dismissal of unnecessary lawsuits is not the only deterrent. As we have just noted, the court may also assess all the costs and legal expenses of vexatious litigation against the plaintiff. Indeed, Congress believed this prospect would keep the balance right. *See Ruckelshaus v. Sierra Club*, *supra*; S. Rep. No. 414, *supra*, at 81.[16]

Finally, it ought to be said that the available evidence does not remotely support the "floodgates" argument suggested. It is not irrelevant that the construction of Section 505 espoused by the courts below has also been adopted by most of the lower federal courts on the front line, in the best position to notice unfairness and to feel any excessive burden.[17] Yet, there has been no unman-

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[16] Contrary to the contentions in some of the briefs, citizen plaintiffs are not so irresponsible as to initiate actions after merely "leafing through" the DMRs filed by permittees (Pet. Br. 44), or to ignore the factors taken into account by the government when bringing suit. *See* Br. A.C. of Rollins Environmental Services (N.J.) 13-15. As an example, the present case resulted from a review by respondents of roughly a hundred major dischargers on Chesapeake Bay. Serious violators were pinpointed, and their compliance records and facilities discussed with state officials. Six notice letters were sent resulting in judicial or administrative enforcement actions either by respondents or the government, or both, in all six cases. *See* J.A. 53-54.

[17] *See Friends of the Earth v. Archer Daniels Midland Co.*, 24 Env't Rep. Cases (BNA) 1993, 1995-1996 (N.D.N.Y. 1986); *Locust*

ageable volume of private enforcement actions.[18] And, at all events, in a recent assessment of citizen suits under the Act, Congress had declared itself well satisfied with the result. *See* S. Rep. No. 50, *supra*, at 28. *See also* 131 Cong. Rec. S-12026 (daily ed. Sept. 24, 1985). The proof of the pudding is in the eating.

Lane v. Swatara Township Authority, 636 F. Supp. 534, 539 (M.D. Pa. 1986); *State of Alabama ex rel. Graddick v. Veterans Administration*, 648 F. Supp. 1208, 1211 (M.D. Ala. 1986); *Student Public Interest Research Group v. Jersey Central Power & Light Co.*, 642 F. Supp. 103, 107 (D.N.J. 1986); *Student Public Interest Research Group v. P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-1084 (D.N.J. 1986); *Connecticut Fund for the Environment and NRDC v. Job Plating Co.*, 623 F. Supp. 207, 213-214 (D. Conn. 1985); *Fishel v. Westinghouse Electric Corp.*, 617 F. Supp. 1531, 1540-1541 (M.D. Pa. 1985); *Sierra Club v. Hanna Furnace Corp.*, 636 F. Supp. 527, 529-530 (W.D.N.Y. 1985); *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120, 1126-1127, 1131-1132 (D. Md. 1985); *Sierra Club and NRDC v. C.G. Manufacturing Co., Inc.*, 638 F. Supp. 492, 494 (D. Mass. 1985); *Student Public Interest Research Group v. American Cyanamid Co.*, 23 Env't Rep. Cases (BNA) 2044, 2049 (D.N.J. 1985); *Student Public Interest Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1194-1199 (D.N.J. 1985); *Student Public Interest Research Group v. Georgia Pacific Corp.*, 615 F. Supp. 1419, 1425-1426 (D.N.J. 1985); *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474, 1476-1477 (D.N.J. 1985); *Student Public Interest Research Group v. National Starch and Chemical Corp.*, 23 Env't Rep. Cases (BNA) 1982, 1984 (D.N.J. 1985); *Student Public Interest Research Group v. Tenneco Polymers*, 602 F. Supp. 1394, 1399 (D.N.J. 1985); *Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 286-287 (N.D.N.Y. 1984); *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532, 535 (W.D.N.Y. 1984); *Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, 853-854 (N.D.N.Y. 1984); *Sierra Club and NRDC v. Raytheon*, 22 Env't Rep. Cases (BNA) 1050, 1053-1055 (D. Mass. 1984); *Student Public Interest Research Group v. Anchor Thread Co.*, 22 Env't Rep. Cases (BNA) 1150, 1154 (D.N.J. 1984).

[18] To be sure, the number of citizen suits tends to increase when government defaults. That is as it should be. Even so, however, the actual volume of private actions in the past few years has been relatively moderate.

2. The present case, as we have sufficiently detailed (pp. 2-5, 21-22, *supra*), is much too egregious to support a credible claim that petitioner has been the victim of vexatious litigation. Although, as it turned out, active violations had ceased a month before suit was filed, there was then good cause to fear that excessive discharges would continue in the future if petitioner were not restrained by injunction or deterred by an assessment of penalties. This is enough to dispose of the case. But we cannot join the United States in its submission that Section 505 ought to be read as permitting citizen suits only in like circumstances.[19]

For our part, we believe there is no warrant for imposing such a limitation, at least as a *jurisdictional* matter. Thus, in the present case, we submit it does not matter whether, on June 15, 1984, when the suit was filed, respondents believed excessive discharges were still occurring or, rather, had been halted in light of the 60-day warning letter. Nor can we accept as dispositive the presence or absence of a reasonable fear about the violations of the past continuing into the future, whether or not they have stopped for the moment. That is, of course, the primary test for the court in deciding whether a permanent injunction is appropriate, and it may also be an ingredient in fixing any penalty award. But we cannot suppose an assessment of civil penalties

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[19] At this writing, we have not seen the brief for the United States in this Court and therefore must rely on its submission below. We assume the Government will, in effect, endorse the rule announced by the First Circuit in the *Pawtuxet Cove* case, *supra*, and will argue, contrary to petitioner, that applying that decision here requires affirmance. Although grateful for this support, so far as it goes, we surmise that conflicting interests within the Government have, once again, led to an unrealistic search for a "middle ground." *Cf. International Paper v. Ouellette*, *supra*, slip op. at 16 n.19.

is *always* wrong when future compliance is assured, for that would unduly excuse, and effectively reward, deliberate delay in taking necessary corrective action until a lawsuit was imminent—and thereby importantly retard the achievement of the Congressional objective. At all events, however, we submit these are questions of *remedy*, not of *jurisdiction*. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

Indeed, once we get beyond the prison of the present tense in Section 505, there is no textual basis for requiring, as a basis for jurisdiction, any particular belief about *future* violations. As we read the provision, it gives the district court jurisdiction to entertain a private suit against an alleged violator of the Clean Water Act, provided only a 60-day notice has been served and neither government is diligently prosecuting a like action. Whether the citizen suit will *succeed* is another matter. In due course, it may become necessary for this Court to give guidance as to the circumstances that justify any remedial order, and, specifically, the assessment of civil penalties. But this is surely not that case. In this Court, at least, no argument is advanced that a penalty order, or the amount of the award, was improper if the district court had jurisdiction of the case. Pet. Br. 7 n.8.[20] And this, we may add, was no imprudent concession.

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[20] We charitably overlook feeble attempts to complain about the assessment without formally challenging it. *E.g.*, Pet. Br. 33 n.42, 44.

CONCLUSION

For the reasons stated, the judgment of the court of appeals affirming the decision of the district court should be affirmed.

Respectfully submitted,

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